

(S E R V E D)
(May 24, 2001)
(Federal Maritime Commission)

FEDERAL MARITIME COMMISSION

FACT FINDING INVESTIGATION NO. 24 -
EXCLUSIVE TUG ARRANGEMENTS
IN FLORIDA PORTS

ORDER OF INVESTIGATION

During the course of the Federal Maritime Commission's ("Commission") recent inquiry into exclusive tug arrangements on the lower Mississippi River, the Commission's attention was directed toward exclusive tug arrangements in Port Canaveral, Florida and Port Everglades, Florida. It appears that each of those ports has been served by a single tug company for more than forty years under a system which requires a franchise in order to provide such services. It also appears that the incumbent franchisee in each of those ports is a subsidiary or trade name of the same tug company.¹ Moreover, there are allegations that no other major United States port has a similar franchise system resulting in service by only one tug company.

¹The incumbent tug operator in Port Canaveral is Port Canaveral Towing, Incorporated, a subsidiary of Seabulk International, Inc. The incumbent tug operator in Port Everglades is Port Everglades Towing, a trade name of Seabulk International, Inc. Prior to March 21, 2001, Seabulk International was known as Hvide Shipping, Inc.

Each of the respective ports recently denied an application for a franchise by a tug company seeking to compete with the long-standing incumbent. In the case of Port Canaveral, an application for a tug franchise by Petchem, Inc. was denied at a hearing before the Canaveral Port District Board of Commissioners on July 21, 2000. In the case of Port Everglades, an application for a franchise by Tugz International, L.L.C., a subsidiary of Great Lakes Towing Co. was denied at a hearing before the Broward County Board of County Commissioners on March 13, 2001.

Pursuant to the Shipping Act of 1984 ("1984 Act"), 46 U.S.C. app. 1701 *et seq.*, the Commission is responsible for regulating the activities of marine terminal operators ("MTOs") as that term is defined by section 3(14) of the 1984 Act.² The Canaveral Port Authority is the governmental body with jurisdiction over Port Canaveral. Port Everglades is operated by the Port Everglades Department, a department of Broward County, under a reorganization which took place in 1994. Both the Canaveral Port Authority and the Broward County Board of County Commissioners would appear to meet the definition of MTO and, in fact, have registered as MTOs in the Commission's FMC-1 database.

Section 10(d) of the 1984 Act, 46 U.S.C. app. 1709(d), provides, in pertinent part:

(1) No common carrier, ocean transportation intermediary, or marine terminal operator may fail to establish, observe and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.

* * *

²Section 3(14) of the 1984 Act, 46 U.S.C. app. 1702(14), defines a marine terminal operator as: "... a person engaged in the United States in the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier, or in connection with a common carrier and a water carrier subject to subchapter II of chapter 135 of title 49, United States Code."

(4) No marine terminal operator may give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person.

On at least two prior occasions, the Commission has determined that these prohibitions, or their statutory predecessors, sections 16 and 17 of the Shipping Act, 1916 ("1916 Act"), 46 U.S.C. app. 815 and 816, apply to an MTO's actions in connection with exclusive tug arrangements. In *Petchem, Inc. v. Canaveral Port Authority*, 23 SRR 974, 987 (1986), *aff'd sub nom., Petchem, Inc. v. FMC et al.*, 853 F. 2d 958 (1988), the Commission found that the Canaveral Port Authority met the definition of MTO and that the Port's practices with respect to tug franchises had "an underlying purpose relating to terminal operations and a more than incidental relationship to the receiving and handling of property and cargo." The Commission found that the exclusive franchise in question in that proceeding was *prima facie* unreasonable and placed the burden upon respondents to justify the arrangements.³

Earlier, in *A.P. St. Philip, Inc. v. Atlantic Land & Improvement Co. and Seaboard Coast Line R.R. Co.*, 11 SRR 309 (1969), the Commission determined that respondent MTOs had subjected themselves to jurisdiction under the 1916 Act by entering into and implementing provisions of an exclusive contract for tug services at a phosphate elevator. There, the Commission found that the practice was unjust and unreasonable under sections 16 and 17 of the 1916 Act.

Section 10(b)(10) of the 1984 Act, 46 U.S.C. app. 1709(b)(10), prohibits an MTO from unreasonably refusing to deal or negotiate.⁴ The broad language of this prohibition is new under the

³However, while finding sections 10(d)(1) and 10(d)(4) of the 1984 Act applicable to these practices, the Commission concluded that the actions of Port Canaveral in denying a tug franchise to Petchem in 1984 were justified on the basis of the facts as presented at that time.

⁴This section is made applicable to MTOs by section 10(d)(3) of the 1984 Act, 46 U.S.C. app. 1709(d)(3).

Ocean Shipping Reform Act of 1998 ("OSRA") and, when read in conjunction with the 1984 Act's revised Declaration of Policy, may be applicable to the actions resulting in tug monopolies at Port Canaveral and Port Everglades.⁵

Although the Commission recognizes that the MTOs responsible for these practices, the Canaveral Port Authority and the Broward County Board of County Commissioners, are public bodies charged with acting in the best interests of their respective ports, the Commission nevertheless has a responsibility to administer the provisions of the 1984 Act in a manner which encourages competition and efficiency in international U.S. commerce. Thus, in view of the recent actions which have resulted in continuation of tug service monopolies at Port Canaveral and Port Everglades, the Commission has determined to commence this nonadjudicatory investigation to gather additional facts related to these practices and their possible contravention of the provisions of the 1984 Act discussed above. Specifically, the Investigative Officer named herein is to develop a record on possible harm caused by the tug monopolies and the factors which may be offered as justification for either or both of the respective port's actions in preventing competition for tug services.

The Investigative Officer is to report to the Commission within the time specified herein with recommendations for any further Commission action, including any formal adjudicatory, injunctive or rulemaking proceedings warranted by the factual record developed in this proceeding. Interested persons are invited and encouraged to contact the Investigative Officer named herein, at (202) 523-

⁵OSRA added a new subsection to the 1984 Act's Declaration of Policy as follows:

(4) to promote the growth and development of United States exports through competitive and efficient ocean transportation and by placing a greater reliance on the marketplace.

5712 (Phone), or (202) 523-0522 (Fax), should they wish to provide testimony or evidence, or to contribute in any other manner to the development of a complete factual record in this proceeding.

THEREFORE, IT IS ORDERED, That pursuant to sections 10, 11, 12 and 15 of the Shipping Act of 1984, 46 U.S.C. app. 1709, 1710, 1711 and 1714, and Part 502, Subpart R of Title 46 of the Code of Federal Regulations, 46 CFR 502.281, *et seq.*, a nonadjudicatory investigation is hereby instituted into practices of the Canaveral Port Authority and the Port Everglades Department/Broward County Board of County Commissioners relating to exclusive tug arrangements in their respective ports, to provide a basis for any subsequent regulatory, adjudicatory or injunctive action by the Commission.


IT IS FURTHER ORDERED, That the Investigative Officer shall be Commissioner Antony M. Merck of the Commission. The Investigative Officer shall be assisted by staff members as may be assigned by the Commission's Executive Director and shall have full authority to hold public or non-public sessions, to resort to all compulsory process authorized by law (including the issuance of subpoenas *ad testificandum* and *duces tecum*), to administer oaths, to require reports, and to perform such other duties as may be necessary in accordance with the laws of the United States and the regulations of the Commission;

IT IS FURTHER ORDERED, That the Investigative Officer shall issue a report of findings and recommendations no later than 180 days after notice of this Order is published in the Federal Register, and interim reports if it appears that more immediate Commission action is necessary, such reports to remain confidential unless and until the Commission provides otherwise;

IT IS FURTHER ORDERED, That this proceeding shall be discontinued upon acceptance of the final report of findings and recommendations by the Commission, unless otherwise ordered by the Commission; and

IT IS FURTHER ORDERED, That notice of this Order be published in the Federal Register.

By the Commission.



Bryant L. VanBrakle
Secretary